petition in the District Court of the United States asking that such a loan of $150,000 be approved, that the mortgage trustees release the two outstanding mortgages, and that a pending petition filed by Nettie Meyer, the prayers of which had been denied on February 25, 1935, be dismissed, all preparatory to consummation of the plan of reorganization and entry of a final decree discharging the debtor (R. 51).

On December 4, 1936, petitioners here presented a petition to vacate the November 23, 1935 order. It represented that while the mortgage trustees were in possession of the property since 1925 and collected the income without notifying the bondholders, they diverted such income to the payment of defaulted bonds and coupons owned by the house of issue, its officers and directors, and neglected to pay taxes, and that by such actions the trustees and the committees became personally liable for gross neglect and violation of duties and that the trustees and committees should be required to make good the loss and pay such taxes; and the petition prayed that the mortgage trustees and the committees be required to account for their acts with reference to the income of the property from 1935, the date the trustees entered into possession, until "the present time" (December 4, 1936), and if it appeared from such accounting that funds were improperly diverted they be adjudged to refund all such moneys to be used toward the payment of taxes (R. 63).

The mortgage trustees answered this petition; also, an answer was filed on behalf of the committees (R. 52). This petition and the answers were referred to a Special Master "to hear and take such evidence as may be presented by the parties upon said petition and the answers thereto, and to hear the arguments of counsel thereon, and to report to this court his conclusions of fact and law on the said petition and answers thereto" (R. 64).

The Special Master made and filed his report in which he made certain Findings of Fact. Among these were:

> "In the brief filed in support of their contentions the petitioners, and their counsel at the hearing, earnestly urged that the Special Master include in his findings of fact certain 'suggestions as to findings of fact,' the gist and purpose of which was to show malfeasance and misfeasance on the part of the Bondholders' Protective Committees and trustees under the trust deeds. I have carefully examined and considered said suggested findings of fact and do not believe them supported by the evidence submitted before me upon this hearing (R. 66). I find that the said Bondholders' Protective Committee and Trustees have acted fairly and justly and in accordance with their duties in the matters concerned which relate principally to disbursements for the payment of principal and interest of bonds, and the payment of taxes, and the relation between said Bondholders' Committees and trustees and the bondholders or beneficiaries under the said trust deeds" (R. 55).

Also among the Special Master's Findings of Fact was: that an oral stipulation was entered into, to the effect that the "moneys collected by the Trustees from the operation of the properties were deposited from time to time with the Depositary designated in the trust deeds for disbursements to holders of bonds and coupons; the holders of bonds and coupons collected their interest and principal from the Depositary upon presentation of their bonds and coupons" (R. 66).

The petitioners filed exceptions to the report of the Special Master contending, among other things, that the Special Master erred in finding that the committees and trustees acted fairly and justly in accordance with their duties; and that the master erred in recommending the

denial of the relief prayed in the petition, and that it was the duty of the Special Master to recommend the granting of the prayers of the petition, "and particularly, the relief prayed against the two Mortgage Trustees and the Bondholders' Protective Committee * * *" (R. 68).

On February 3, 1937, the District Court of the United States, after argument, entered an order in the 77B proceeding overruling each and all of the exceptions of petitioners to the report of the Special Master; confirming, approving and adopting the report of the Special Master "together with his findings, conclusions and recommendations contained therein"; and denying each and every prayer of the petition of December 4, 1936, and finally dismissing the petition (R. 68).

These are the proceedings in the 77B case which respondents set up by an amended answer on January 22, 1940, in the state court case as *res judicata* of the issues in that case (R. 23). Petitioners here on the same day filed a reply to this amendment but made no claim therein of any title, right, privilege or immunity under the Constitution of the United States.

The state court decree of February 29, 1940, recited that it was entered on the complaint, as amended, the answers, and *reply* (this being petitioners' reply to the plea of *res judicata*) and then dismissed the complaint for want of equity (R. 25).

Despite all that petitioners assert in their petition regarding the doctrine of *res judicata*, it is important to note that the Appellate Court of Illinois in its opinion in this case, *Meyer* v. *Kenmore-Granville Hotel Co.*, 308 Ill. App. 78, set forth in full in an appendix to this brief, did not decide the case solely on the ground that the decree of the District Court of the United States was *res judicata* of the issues, but only stated that it was "dis-

posed to hold that plaintiffs are precluded." The Appellate Court also said, p. 82:

> "Plaintiffs in the original suit in the State court set up the same matters which were considered upon this reference in the United States court, and upon the conclusion of the litigation in the federal courts defendants set up in the State court the federal judgment as *res adjudicata* of the issues. The issues and the parties were identical and having been once determined by a court of competent jurisdiction it would seem the maxim that there must be an end to litigation should be applied. *Stoll* v. *Gottlieb*, 305 U. S. 165. We are disposed to hold that plaintiffs are precluded. *However, we have given consideration to the appeal on its merits.*" (Italics ours.)

The court further said:

> "*The federal courts have decided their charges against these trustee to be without merit and a careful consideration of the record leads us to the same conclusion. The judgment will be affirmed.*" (Italics ours.)

SUMMARY OF ARGUMENT.

I.

Statement in petition for rehearing before Appellate Court that the court in sustaining the plea of *res judicata* deprived plaintiffs of their property without due process of law under the Fifth and Fourteenth Amendments does not specially set up any title, right, privilege or immunity under Constitution of the United States. Such statement is not specific or broad enough to include contention that federal court did not have jurisdiction of subject matter or parties in December 4, 1936 petition filed by petitioners for accounting by trustees and committees.

II.

The bankruptcy court had jurisdiction of the subject matter of petitioners' petition of December 4, 1936 which sought to compel mortgage trustees to account for and pay moneys over to the estate. It had jurisdiction of the petitioners who invoked it by presenting the petition; and of the mortgage trustees and the committees because they submitted and consented to jurisdiction.

III.

A claim of right, title, privilege or immunity under the Constitution comes too late when made in a petition for rehearing unless the action of the highest court of the state complained of could not have been anticipated.

IV.

The decision of the Appellate Court complained of should have been anticipated because (a) the trial court sustained the plea of *res judicata*; (b) the decree of the trial court decided that it was made upon the amended complaint, the answer including the plea of *res judicata,* and upon the *reply* of petitioners, thereby giving petitioners full notice that it had passed upon the plea of *res judicata*; and (c) petitioners devoted ten pages of their brief in the Appellate Court to *res judicata* but claimed no right, title, privilege or immunity under the Constitution.

V.

Opinion of Appellate Court shows that it carefully examined the record and concluded that contentions of petitioners were without merit; and therefore it agreed with the opinion of the District Court and, accordingly, affirmed the judgment.

ARGUMENT.

I.

No right, title, privilege or immunity was specially claimed under the Constitution, a treaty or a statute of the United States.

The only claim made, was in the petition for rehearing to the Appellate Court of Illinois, 308 Ill. App. 78 (which does not appear in the record, only in the petition), that: "In sustaining the plea of *res adjudicata* this court deprived the plaintiffs of their property without due process of law in contravention of the Fifth and Fourteenth Amendments to the Federal Constitution" (Petition 31). Of course, the Fifth Amendment is not involved. This claim does not raise a Federal question. A decision of a state court sustaining a plea of *res judicata* does not present a Federal question. *City and County of San Francisco* v. *Itsell*, 133 U. S. 65, 33 L. ed. 570; *Adams & Co.* v. *Board of Liquidation of the State of Louisiana*, 144 U. S. 651, 36 L. ed. 578. In the *Itsell* case the state court had decided the issue whether a former judgment rendered against plaintiff in error was a bar to the action. This court, by Mr. Justice Gray, said: "That was a question of general law only, in no wise depending upon the Constitution, treaties or statutes of the United States. *Chouteau* v. *Gibson*, 111 U. S. 200." In the *Adams* case this court held that a decision of a state court, as to plea of prior adjudication, does not present any Federal question. This court said: "Whether or not the adjudication upon the first bonds of the same series could be pleaded as an estoppel to

the proceeding for the refundability of other bonds of the same series, is not a Federal question."

Petitioners cite *Cumberland Glass Mfg. Co.* v. *DeWitt*, 237 U. S. 447, 59 L. ed. 1043, and *Hansberry* v. *Lee*, 311 U. S. 32, 85 L. ed. 11, in support of their contention that sustaining the plea of *res judicata* deprived plaintiffs of their property without due process of law. The *Cumberland* case does not hold that sustaining a plea of *res judicata* raises a Federal question; but does hold that the sustaining of a demurrer to a plea of *res judicata* based upon a judgment of a federal court adjudicating a right of federal origin, presents a Federal question, "because the plea of former judgment in a Federal court adjudicating a right of Federal origin asserts a right which, *if denied*, made the case reviewable here under § 709, Revised Statutes, § 237 Judicial Code." No Federal question arises with respect of a state court order that *recognizes* a right established by a federal court order. The Federal question involved in the *Hansberry* case was not sustaining a plea of *res judicata*, but was the fact that in the prior adjudication the court did not have jurisdiction of the parties.

The question remains whether this pretended claim is broad enough to include the contention, first made in the petition for *certiorari* in this court, that the District Court of the United States did not have jurisdiction of the parties or the subject matter in its order of February 3, 1937.

Petitioners' claim as set up is too general to raise such a Federal question. There is not even color of a Federal question. *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 37 L. ed. 267. The Federal right must be specially set up. This is particularly true in view of the fact that petitioners never questioned the jurisdiction of the District Court of the United States over the parties to or the subject matter of their petition of December 4, 1936, before the Special Master, in the District Court, in the appeal to the United

States Circuit Court of Appeals, *Meyer* v. *Kenmore-Granville Hotel Co.*, 92 F. (2d) 778, nor in the petition for certiorari denied in this court, *Meyer* v. *Kenmore-Granville Company*, 302 U. S. 767; nor in the Superior Court of Cook County, nor in their appeal from the decision of that court to the Appellate Court of Illinois, *Meyer* v. *Kenmore-Granville Hotel Co.*, 308 Ill. App. 78. Their pretended claim of title, right, privilege or immunity as set forth in their petition for rehearing in the Appellate Court of Illinois gave that court no inkling that the petitioners were attacking the jurisdiction of the District Court to enter its order of February 3, 1937.

Such claim was first made in their petition for *certiorari* to this court. On page 7, that petition states that "the federal jurisdiction was confined to the *res* and not to the action *in personam* against the trustees and the committees for accounting, malfeasance and misfeasance." On page 15, their petition states: "The federal court was without jurisdiction of the action *in personam* for accounting against the trustees and the committees." This is all there is to be found in the petition for *certiorari* or in the record to establish petitioners' contention made at this late hour that the District Court lacked jurisdiction in entering the February 3, 1937 order and we submit it is insufficient; and further that no substantial Federal question is raised on this record.

II.

The bankruptcy court had jurisdiction of the subject matter of petitioners' petition of December 4, 1936, and of the parties thereto.

Bankruptcy courts have jurisdiction to recover assets or to enforce rights belonging to the estate if the defendants or adverse claimants consent thereto. *Harris* v. *First Na-*

tional Bank, 216 U. S. 382; 54 L. ed. 528. When there is such *consent* to jurisdiction in a bankruptcy court, as there was here, that jurisdiction will cover determination of all claims of the parties involved. *In re Blake,* 150 Fed. 279. In this case petitioners sought to compel the mortgage trustees to account for and pay moneys over to the estate. They did this by presenting a petition in which they invoked the jurisdiction of the District Court. These trustees and committees submitted to the jurisdiction of the bankruptcy court and answered the petition. Petitioners' present claim of lack of jurisdiction in the District Court in the premises is unsubstantial and trivial. It was not even argued in their brief.

It is argued, however, that respondents took a position in their brief in the Circuit Court of Appeals inconsistent with their position in presenting the District Court order as *res judicata* of the issues in the state court case; and that, therefore, they were estopped to plead *res judicata.* To support this contention petitioners lifted a few paragraphs of respondent's brief in the Circuit Court of Appeals from their context and inserted them in the record (R. 45). We do not believe them susceptible of the interpretation placed on them by petitioners. However, whether respondents were or were not estopped to plead *res judicata* was a general question of law and not a Federal question. In *Beals* v. *Cone,* 188 U. S. 184, 47 L. ed. 435, this court said:

> "The estoppel was not one of record, but *in pais,* arising, as contended, from contradictory statements made by one of the defendants at a different time and place. Whether such statements worked an estoppel depends, not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law."

III.

The claim of right, title, privilege or immunity under the Constitution was made too late.

The pretended claim was made after the final judgment of the state court of last resort. It could and should have been made in the trial court. This court has held it is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon. *Bowe* v. *Scott*, 233 U. S. 658, 58 L. ed. 1141. The Appellate Court of Illinois did not consider and pass upon the Federal ground presented and relied upon by petitioners in their petition for rehearing to that court. It is well settled that the Federal right must have been set up and adjudicated against the claimant by the judgment of the state court before he may bring the case to this court. *Cleveland & P. R. Co.* v. *Cleveland*, 235 U. S. 50, 59 L. ed. 127. It was said in *Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80 that if the right was not claimed in the proper court below, the judgment of the highest court of the state is conclusive, so far as the right of review is concerned. A long line of decisions of this court is to the effect that it is too late to raise a Federal question for the first time in a petition for rehearing after the final judgment of the highest state court, unless the state court actually entertains the petition and decides the Federal question and this appears from the record. *Susquehanna Boom Co.* v. *West Branch Boom Co.*, 110 U. S. 57, 28 L. ed. 69; *Mutual Life Ins. Co.* v. *McGrew*, 188 U. S. 291, 47 L. ed. 480; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 55 L. ed. 173.

The record is devoid of anything showing that a Federal question was raised and decided, so as to confer jurisdiction on the Federal Supreme Court. *Harding* v. *Illinois*, 196 U. S. 78, 49 L. ed. 394. An examination of the opinion (Appendix, this brief) rendered by the Illinois Appellate Court discloses clearly and definitely that no Federal question was decided.

IV.

Petitioners' contention that their claim of title, privilege and immunity set forth in the petition for rehearing to the Appellate Court of Illinois is timely, because the decision of the Appellate Court on res judicata was unanticipated, is without merit.

Petitioners refer to *Saunders* v. *Shaw*, 244 U. S. 317, 61 L. ed. 1163, and *Herndon* v. *Georgia*, 295 U. S. 441, 79 L. ed. 1530, to support this contention. In those cases it was held that when the act complained of is the act of the state supreme court done unexpectedly at the end of the proceedings, when plaintiff in error no longer has any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come to this court; but this court said in the *Herndon* case:

> "The whole point, therefore, is whether the ruling here assailed should have been anticipated."

We think there is no doubt that this ruling "should have been anticipated." It should have been anticipated in the trial court where petitioners made reply to the plea of *res judicata* set up in the amendment to respondents' answer in that case; but in which reply no claim of title, right, privilege or immunity under the Constitution was made.

Petitioners assume that because the decree of the trial court was a dismissal for want of equity, it did not decide the *res judicata* question. There is no room for this assumption. The proper order on sustaining a plea in chancery is dismissal of the bill. In *U. S.* v. *California & Oregon Land Co.*, 148 U. S. 31, 37 L. ed. 354, this court discusses the nature and function of pleas in equity and quotes from *Farley* v. *Kittson*, 120 U. S. 303, 30 L. ed. 684, as follows:

> "* * * The plaintiff may either set down the plea for argument, or file a replication to it. If he sets down the plea for argument, he thereby admits the truth of all the facts stated in the plea, and merely denies their sufficiency in point of law to prevent his recovery. If, on the other hand, he replies to the plea, joining issue upon the facts averred in it, and so puts the defendant to the trouble and expense of proving his plea, he thereby, according to the English chancery practice, admits that, if the particular facts stated in the plea are true, they are sufficient in law to bar his recovery; and if they are proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. Mitford, Ch. Pl. 302, 303; Story, Eq. Pl. § 697. That practice in this particular has been twice recognized by this court. *Hughes* v. *Blake*, 19 U. S. 6 Wheat, 453, 472; *Rhode Island* v. *Massachusetts*, 39 U. S. 14 Pet. 210, 257."

The case of *Perry* v. *United States School and Furniture Co.*, 135 Ill. App. 1, involved pleas in chancery. After general replication to each plea, the order in sustaining the pleas was a dismissal for want of equity.

Presumably the Appellate Court of Illinois was of the opinion that the trial court had sustained the plea of *res judicata* and that it was reviewing this decision. This is true because the Appellate Court of Illinois has only ap-

pellate jurisdiction. Smith-Hurd Ann. St. Ch. 37 § 32, provides that appellate courts "shall exercise appellate jurisdiction only."

Furthermore, the decree of the trial court recites that it is entered upon the complaint, as amended, the answer and the *reply*. The *reply*, filed by petitioners related solely to the plea of *res judicata*. Accordingly, petitioners had full notice that the order of the trial court made disposition of the plea of *res judicata*.

However, indisputable evidence that petitioners did anticipate action by the Appellate Court of Illinois on the plea of *res judicata* is the statement of petitioners in their petition for rehearing that: "The entire argument in our brief (pp. 35-45) on the question of *res adjudicata* was wholly overlooked by this court," referring to the Appellate Court of Illinois. The court will note that petitioners devoted 10 pages of their brief to the "unanticipated" question of *res judicata;* but not one word in respect of any claim of right, title, interest or immunity under the Constitution of the United States.

V.

The entire decision of the Appellate Court of Illinois was on non-federal questions.

Not a word of the opinion of the Appellate Court is devoted to a Federal question.

The court first discusses the proceedings in the 77B case, set forth in the plea of *res judicata*, and concludes: "We are disposed to hold that plaintiffs are precluded." This is not a decision of a Federal question. As we have already shown, a state court decision on a question of *res judicata* is a decision of general law and not of a Federal question.

However, the next sentence of the Appellate Court settles the whole matter. It is: "However, we have given consideration to the appeal on its merits." The court then demonstrates in three places on page 83 of the opinion that it had examined the record; and it is obvious the court made its decision from its examination of the record and did not base its decision solely on the bar of the 77B order. The court said:

> "* * * The federal court has decided their charges against these trustees to be without merit and a careful consideration of the record leads us to the same conclusion. The judgment will be affirmed."

This last sentence shows that the judgment was affirmed, not on the ground that petitioners were barred by the prior Federal Court adjudication, but on the ground that the Appellate Court of Illinois, after a careful consideration of the record, came to the same conclusion arrived at by the Federal Court. We submit the petition for certiorari should be denied.

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HARRY E. SMOOT,
Of Counsel.

APPENDIX.

Nettie Meyer, et al., Appellants v. Kenmore-Granville Hotel Company, et al., Samuel J. T. Straus, et al., Appellees.

Gen. No. 41220.

Mr. Justice Matchett delivered the opinion of the court.

The plaintiffs own 19 bonds of issues amounting to $1,000,000 each, secured by trust deeds conveying the Sovereign Hotel and the "Annex" to it. Default was made. On May 8, 1925, the trustees took possession and operated the hotels as a unit until August 14, 1934, when a tax receiver was appointed for both premises.

February 4, 1935, the debtors filed a petition in the United States District Court under §77B of the amended Bankruptcy Act (11 U. S. C. A., §207) for reorganization. February 8, this suit for an accounting against the trustees and others was filed. Plaintiff, Nettie Meyer, on February 25, 1935, filed a petition in the United States District Court to dismiss the proceedings because of bad faith and want of jurisdiction. The court reserved ruling until after the plan of reorganization should be submitted but directed notice of proceedings to be given to her counsel. When the plan was filed plaintiffs filed objections and submitted modifications. Nettie Meyer (not wishing to waive her claim of bad faith) did not join in the proposed modifications. The plan as modified was approved May 26, 1935. Nettie Meyer appealed from the order denying her motion to dismiss and also from the order approving the plan as modified. Her appeals were dismissed by the

United States Circuit Court of Appeals. Certiorari was allowed by the Supreme Court of the United States. Upon review the court held the appeals were properly dismissed because such appeals were only by leave, which she had not obtained. (*Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160.)

November 23, 1936, the United States District Court entered an order directing the release of the two trust deed indentures and authorizing a new mortgage of $150,000, and dismissed the petition of Nettie Meyer.

December 4, 1936, plaintiffs filed their petition to vacate the order of November 23, setting up that it was entered in the absence of counsel and that the trustees (defendants here) had not been required to account for their management of the premises while in possession. Answers were filed and the petition sent to a referee, who reported recommending that the prayer of the petition be denied. Exceptions were filed by plaintiffs which were overruled by the court and the report approved February 25, 1937.

Plaintiffs undertook to secure a review of this order without leave and for this reason the appeal from the order was dismissed. (*In re Kenmore-Granville Hotel Co.*, 92 F. (2d) 778; *Meyer* v. *Kenmore-Granville Hotel Co.*, *Id.*) The court of appeals said "appellants" could not reopen the issues concerning which their appeals were dismissed, citing *In Re Trust Co. No. 2988 of Foreman Trust & Savings Bank*, 85 F. (2d) 942. The opinion states:

"The report of the referee indicates a very careful consideration of the oral testimony, stipulation of facts, briefs and argument of counsel. On the basis of this study he concluded that the parties had adequate notice of the hearing of November 23, and opportunity to object at that time if they so desired. He also found that the issues sought to be raised by the petition of December 4, were

substantially identical with those sought to be raised by appellant Meyer in her petition of February 25, 1935, the prayer of which was denied on March 20, 1935. They are also similar to those raised by the objections filed by the other appellants to certain claims against the debtor and to the plan of reorganization, which objections were overruled by the court May 20, 1935. The referee therefore states, 'Both . . . Meyer . . . and her co-petitioners . . . had ample opportunity . . . to raise each and every issue which is now sought to be raised in the petition now pending as filed by said petitioners. The petition now pending is merely an attempt, in a roundabout, subsequent, and extraordinary manner, to obtain a review of matters heretofore presented to and determined by a Judge of this Court, without pursuing the usual method of writs of appeal and certiorari to upper courts from the actual orders and proceedings of which complaint is made.' ''

Plaintiffs in the original suit in the State court set up the same matters which were considered upon this reference in the United States court, and upon the conclusion of the litigation in the federal courts defendants set up in the State court the federal judgment as *res adjudicata* of the issues. The issues and the parties were identical and having been once determined by a court of competent jurisdiction it would seem the maxim that there must be an end to litigation should be applied. *Stoll* v. *Gottlieb*, 305 U. S. 165. We are disposed to hold that plaintiffs are precluded. However, we have given consideration to the appeal on its merits.

Plaintiffs allege the trustees while in possession of the property deposited the income from the premises with S. W. Straus & Company. These bonds were what were known as "Straus bonds." The trustees and most of the bondholders' committee were interested in S. W. Straus & Company. It is urged the trustees ought not to have used

S. W. Straus & Company as a depositary. The bonds and coupons were payable at the office of S. W. Straus & Company. There was nothing in the trust deed to prevent the trustees from so depositing the funds, although in view of the entire situation rules applicable to fiduciaries generally would apply. *Pepper* v. *Litton,* 308 U. S. 295, 60 Sup. Ct. 238, cited, is not applicable.

The complaint charged the trustees acted wrongfully in that S. W. Straus & Company were allowed to reimburse themselves out of funds deposited with them on account of moneys which it advanced from its own funds in order to meet the payments of coupons and principals at maturity. Defendants insist that there is no proof this was done. Plaintiffs insist it is admitted by the pleadings (also proved) and that it is contrary to law. *Coffey* v. *Lawman,* 99 F. (2d) 245. That case holds such a payment by a volunteer is not a purchase of the bond or coupon paid and that its effect is to subordinate the bonds and coupons thus paid to the rest of the issue. This case is, however, distinguishable from that and similar cases cited by plaintiffs to this point, in that here the trust deed gave specific authority to do this. Moreover, the record shows that notwithstanding this provision in the trust deed, S. W. Straus & Company voluntarily subordinated almost $400,000 par value of bonds and coupons which it had paid in reliance upon this provision of the trust deed. We search this record in vain for evidence from which it can be inferred that these plaintiffs have been injured in any way on account of this. We say this not unaware of the dangers inherent in this practice.

Plaintiffs further seek to have the trustees held liable on the ground of gross negligence and fraud. First, it is said, they permitted a second mortgage on these premises to be foreclosed and title to be obtained through a master's deed by one of the officials of S. W. Straus & Company.

The holders of the first mortgage were not made parties. In what respect plaintiffs were injured or their securities depreciated by this foreclosure the record does not disclose and we are unable to see.

Secondly, plaintiffs present in the State as in the federal court the novel contention that the payment of interest from 1925 to 1931 by the trustees without disclosing default of the mortgagors to the holders of the bonds was fraudulent and thereby plaintiffs lost 90 per cent of their investments, for which defendants are liable. The interest was paid pursuant to the provisions of the trust deed, the purpose of which was to prevent a default in the bonds which would seriously impair their market value. The evidence is devoid of any proof tending to show that the loss which plaintiffs have sustained was in any way the result of these payments. The theory that the payment of a part of a given security may cause the loss of the rest of it is unusual and novel. Of course, if these payments had not been made and the issue allowed to go into default a foreclosure might have resulted. In that case plaintiffs might have appropriated the property to the payment of their debt. The depreciation in the value of such properties during the period of time from 1925 to 1931 is too well known to need comment or discussion. The books are full of cases showing that important fact to the sorrow of many investors.

The holders of this comparatively small amount of these securities by much litigation have given to their bonds an unusual nuisance value. The federal courts have decided their charges against these trustees to be without merit and a careful consideration of the record leads us to the same conclusion. The judgment will be affirmed.

Judgment affirmed.

O'Connor, P. J., and McSurely, J., concur.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 204

NETTIE MEYER, ANNA JACOBSON, JACOB MEYERHOFF, JOSEPH MEYERHOFF, JULIUS MEYERHOFF, RAY MANN AND JOHN J. PANKIN,

Petitioners,

vs.

KENMORE-GRANVILLE HOTEL COMPANY, SAMUEL J. T. STRAUS, MELVIN L. STRAUS, M. A. ROSENTHAL ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

PETITIONER'S REPLY BRIEF.

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